Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 2001

RICHARD D. DONOHOO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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278P

A. Questions for Review

1. Does the statute of limitations as specified in 28 United States Code §2642 commence with the date of the claimed violation?

2. Under the provisions of 28 United States Code §2642, is the date of the violation the date when the claim first accrued?

3. Does the decision of the Eighth Circuit conflict with the decision of this Court in *Unexcelled Chemical Corp v. United States,* 345 U.S. 59, 73 S.Ct.580, 97 L.Ed.821 (1953), a parallel case interpreting a similar statute?

4. Does the decision of the Eighth Circuit conflict with the decision of the Fifth Circuit in *United States v. Core Labs Inc.,* 759 F.2d 480 (5th Cir. 1985)?

5. Does the decision of the Eighth Circuit holding that the limitations period that begins to run only after the government concludes its administrative proceedings effectively eliminates the provisions and purposes of 28 United States Code §2642?

B. List of all Parties

The petitioner is Richard D. Donohoo.

The federal agency involved is the Federal Deposit Insurance Corporation.

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D. Citation of the Opinion

United States of America v. Godbout-Bandal, 232 F.3d 637, (8th Cir. 2000), a copy of which is incorporated in the Appendix.

E. Basis for Jurisdiction

In November 1998, the United States on behalf of the Federal Deposit Insurance Corporation ("FDIC") commenced an action in the District Court of Minnesota to enforce civil money penalties against Richard Donohoo and others arising out of a Order of the FDIC Board of Governors and subsequently affirmed by the Eighth Circuit Court of Appeals. The District Court ordered judgment in favor of the United States.

That decision was appealed by Donohoo to the Eighth Circuit Court of Appeals. Its Opinion affirming the District Court was filed on November 15, 2000. A Petition for Rehearing by Panel and Petition for Rehearing En Banc was timely filed on December 28, 2000. The Order Denying Petition for Rehearing by Panel and Petition for Rehearing En Banc was dated January 29, 2001.

This Petition is filed within 90 days after entry of the Order denying Petition for Rehearing by Panel and for Rehearing En Banc as required by Rule 13 of the United States Supreme Court Rules.

The statutory provision conferring on the Court jurisdiction to review by a writ of certiorari the opinion of

the Eighth Circuit and resulting judgment is 28 U.S.C. §1254, which provides:

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . .

F. Statutes Involved

The statutes include the following:

28 U.S.C. § 2462, which provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

G. Statement of the Case

The facts are not in dispute and are based on the chronology of the events in this matter. The basic dispute

concerns whether Defendant and other investors were required to file under the Change in Bank Control Act of 1978 (12 U.S.C. § 1817 (j)) when they inserted $1,000,000 in cash in Capital Bank, a federally insured financial institution, in July 1990, a time in which the banks in the United States were in a banking crisis. The cash was inserted as capital to meet the capital requirements imposed by the FDIC and without question this capital insertion enabled Capital Bank to survive even to this day without expense to the taxpayers. The FDIC's position was that filing was required. The history of the FDIC enforcement efforts is as follows:

July 1990	Insertion of $1,000,000 as capital in Capital Bank by Donohoo and others with knowledge of the FDIC
August 1992	Donohoo and other shareholders contract for sale of their stock in Capital Bank
September 1992	Assessment of civil money penalties by FDIC; Donohoo and others request an administrative hearing
December 1992	Donohoo and the other investors sell their interest in Capital Bank
April, May 1993	Administrative hearing
September 1994	Administrative Law Judge issues a Recommended Decision
July 1995	FDIC Board of Governors issues Decision and Order modifying

	Recommended Decision and ordering Donohoo to pay $1,000,554
September 1995	Donohoo and others appeals to Court of Appeals for the Eighth Circuit without posting bond or seeking stay of Decision and Order except for one defendant who does post bond
January 8, 1997	Court of Appeals issues decision, *Lindquist & Vennum v. Federal Deposit Insurance Corporation*, 103 F.3d 1409 (8th Cir. 1997)
November 1998	FDIC commences this action to recover civil money penalties

For the purposes of this action, Donohoo is not denying that the violations occurred or that the penalties were assessed, but denies that he owes any money on the grounds that the statute of limitations has run.

The basis for federal jurisdiction in the District Court of Minnesota is 12 U.S.C. §§ 1817(j)(16) (E) and 1818(i) and 28 U.S.C. §§ 1345 and 1355.

H. Argument

By holding that the statute of limitations under 28 United States Code §2642 does not start running until the administrative process results in a final determination, the decision of the Eighth Circuit conflicts with the holdings of

the United States Supreme Court, a well reasoned decision of the Fifth Circuit, and the plain meaning of the statute.

The United States Supreme Court case interpreting a similar statute is *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59, 73 S. Ct. 580, 97 L. Ed. 821, (1953*)*. In that case, the statute was the Portal-to-Portal Act of 1947, 61 Stat. 84,87, 29 U.S.C. § 255, which provided in Section 6 a two-year statute of limitations for any action to enforce any cause of action under the Fair Labor Standards Act of 1938; that section also provides that "every such action shall be forever barred unless commenced within two years after the cause of action accrued." At 345 U.S. 61. In that case, an action to recover from a contractor liquidated damages was commenced within two years from the time when a formal complaint in administrative proceedings was issued, but more than two years from the time when the contractor violated the act. Judge Douglas wrote the unanimous opinion that the cause of action accrued when the violation occurred and stated: "It was from that date that the period of limitations began to run." At 345 U.S. 66.

Judge Douglas then stated:

> This construction, it is said, will prejudice the power of the United States to safeguard the public interest. But if there is prejudice it is the result of the Portal-to-Portal Act which Congress, having made, can refashion.

The instant case is similar. The FDIC cannot complain about the consequences of the statute of limitations and cannot seek to avoid it against Donohoo. Its complaints about the hardships of the statute should be addressed to the Congress, not to this court. After all, the

FDIC had considerable input to Congress when the banking laws in the late 1980's and early 1990's were dramatically revised and extended during the banking crisis. At that time, the duties and responsibilities of bankers and the corresponding penalties were considerably broaden and increased. Congress could have provided for a different period of limitations for the FDIC but it did not do so. Thus, the FDIC was subject to 28 U.S.C. § 2462.

An early decision of the United States Supreme Court supports the clear language of 28 United States Code §2642. As stated with approval in *3M Company v. Browner*, 17 F.3d 1453 at 1457, 305 U.S.App.D.C. 100 at 104, (1993):

> "In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain for ever liable to a pecuniary forfeiture." Adams v. Woods, 6 U.S. (2 Cranch) 336, 341, 2 L.Ed. 297 (1805) (Marshall, C.J.). Justice Story, sitting as a circuit justice in a civil penalty case, made the same point as Chief Justice Marshall: "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence."

Certainly the holding of the Eighth Circuit allows prosecutions by the FDIC a "perpetuity of existence". The capital was contributed to the bank in July 1990 with the knowledge of the FDIC. It did not commence its enforcement proceeding until September 1992 after Donohoo and others had executed contracts for the sale of Capital Bank. Over two years had elapsed. In that period of time, the FDIC claimed that it was entitled to a

maximum daily penalty of $1,000,000 for each alleged violation. The total amount sought against Donohoo was over two billion dollars. If the FDIC has waited for two more years, as it claims that it has the right and power to do, the amount would exceed four billion dollars. Obviously, if the FDIC's position is that the time limitations start after the decision of the final reviewing court, the longer it waits, the higher the penalty. There would be no limits and it would render any statute of limitations virtually meaningless.

The Eighth Circuit's decision is in direct conflict with the decision of the Fifth Circuit, *United States of America v. Core Laboratories, Inc.*, 759 F.2d 480, (Fifth Circuit 1985), which had the same issue: "The issue for decision is when a particular statute of limitations begins to run, that of *28 U.S.C. § 2462.*" *Id.* at 481. After citing the statute, the *Core* court stated: The issue for decision is the meaning of 'the date when the claim first accrued.' " *Id.* at 481. The *Core* court stated:

> Under that section, the time is reckoned from the commission of the act giving rise to the liability, and not from the time of imposition of the penalty, and it is applicable to administrative as well as judicial proceedings. *Id.* at 482.

After citing the Senate Report and the House Report, it stated at 482, 483:

> It is thus abundantly clear that both the courts and Congress have construed the "first accrual" language of § 2462 to mean the date of the violation.

Practical considerations support this construction. The progress of administrative proceedings is largely within the control of the Government. *Northern Metal Co. v. United* States, 350 F.2d 833, 839 (3d Cir. 1965). The government is exempt from the consequences of its laches (*quod nullum tempus occurrit regi*). *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132, 58 S.Ct. 785, 788, 82 L.Ed. 1224 (1938); *United States v. Hughes House Nursing Home, Inc.*, 710 F.2d 891, 895 (1st Cir. 1983) (private defendant cannot assert laches against government). A limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none. As one court has explained,

> If the penalty does not accrue [under § 2462] until the United States makes an administrative determination that it is due, the United States has within its power to prolong the period of limitations and the producer of rice "would remain indefinitely under the hazard of having penalties imposed upon him . . ." *United States v. Lynn, supra*, 132 F. Supp. [605] at 607. The Court is of the view that such is not the case.
>
> *Appling*, 239 F. Supp. at 194.

We take the same view. The interpretation of § 2462 advanced by the government is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them.

The Eighth Circuit has disagreed with the holding of *Core* by relying on *United States v. Meyer*, 808 F.2d 912 (First Cir. 1987). The argument made in *Meyer* of the difficulty of adhering to the statute of limitations by an agency should be made to Congress. As is readily apparent from an examination of Title 12 of the United States Code and as a result of the then existing banking crisis, the banking laws were substantially amended in the late 1980's and early 1990's to impose greater control over the nation's banks and substantially increase the penalties and enforcement tools available to the FDIC. The FDIC could have requested Congress and Congress could have adopted a different statute of limitations so that 28 U.S.C. § 2462 would be inapplicable. [That section commences with the phrase: "Except as otherwise provided by Act of Congress."] In fact, *Core* was decided in 1985. Both the FDIC and Congress have had plenty of time to reverse that decision by adopting a different statute of limitations for the banking laws or amending 28 U.S.C. § 2462. But such was not done and the FDIC must follow the law. The five years has elapsed.

The Eighth Circuit also noted that the Fifth Circuit's interpretation could encourage violator abuses of the administrative system. However, as *Core* pointed out, the "progress of administrative proceedings is largely within the control of the Government." *Id.* at 482.

The FDIC certainly controlled the progress in this case. Over two years elapsed before the FDIC commenced its case. The hearing was six months later. From that point forward, the time is that utilized by the Administrative Law Judge and the FDIC Board of Governors.

The Eighth Circuit has dismantled the meaning of 28 United States Code §2642 by holding "that where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination." 28 U.S.C. § 2462 does not contain that exception or modification. Thus, the Eighth Circuit has simply created new law. This is not its province; it is the province of Congress.

Furthermore, 28 U.S.C. § 2462 does not state that the five years commences from the date of the decision of the final reviewing court. It does not state that the limitation period for enforcement of any civil fine commences after determination of the civil fine by the agency, such as the FDIC Board of Governors. (The statute does not apply to equitable remedies.) What it states in plain and convincing language is that enforcement of a civil penalty must be commenced within five years from the date when the claim first accrued.

The statute is clear. The enforcement of a civil fine, such as in the instant case, must be commenced within 5 years from the date when the claim first accrued.

Certainly, the rationale for the statute makes sense. The Congress has determined that federal agencies, such as the FDIC, should not be able to keep people at bay for years and years. The FDIC has control of the situation. It determines if and when to assess penalties and the administrative process.

In the instant case, the claim first accrued in July 1990 when the capital was inserted. The FDIC had

knowledge at that time as to the insertion of capital. In any event, it is rather obvious that the claim of the FDIC accrued no later that September 1992 when the FDIC first assessed civil money penalties. Thus, the five-year limitation expired no later than September 1997. The government did not commence its enforcement of the civil fine until November 1998 and thus its enforcement action is simply too late.

Conclusion

Our country was founded on the principle that we are a "government of laws." This decision by the Eighth Circuit abuses that principle and substitutes the idea that we are a "government of governments."

Against alleged banking violators, the laws are interpreted technically, narrowly and precisely. The FDIC imposes daily fines up to $1,000,000 calculated from the date of the alleged violation to the date of the assessment by the FDIC. Indeed, the longer the period the FDIC waits for assessing the fines, the higher the amount of the fines. Good faith and intent are not at issue when assessing the fines.

But when it comes to laws that are not favorable to the FDIC, the laws are to be interpreted widely and loosely and subject to exceptions not contained in the law.

The decision of the Eighth Circuit should be reversed.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 00-1601

United States of America,	*	
Plaintiff-Appellee,	*	Appeal from the United
v.	*	States District Court for
Cheryl C. Godbout-Bandal;	*	the District of
Bruce A. Rasmussen; Wayne	*	Minnesota
Field;	*	
Defendants,	*	[Published]
Richard D. Donohoo,	*	
Defendant-Appellant.	*	

Submitted: October 20, 2000

Filed: November 15, 2000

Before HANSEN, MURPHY, and BYE, Circuit Judges.

BYE, Circuit Judge.

The district court[1] granted summary judgment to the federal government on its claim for enforcement of an award of civil penalties against defendants for violation of the Change in Bank Control Act, 12 U.S.C. § 1817(j). Defendant Richard D. Donohoo (Donohoo) appeals on the single issue of whether the applicable five-year statute of limitations bars the government's claim. We affirm.

I.

In July, 1990, Donohoo and the other defendants, officers of Capital Bank, inserted $1,000,000 in cash into that institution during the banking crisis, in order to meet the bank's capital requirements. The investment allowed Capital Bank to weather the crisis; but, as it turned out, Donohoo and his cohorts violated the Change in Bank Control Act when they made their investment without first obtaining approval from the Federal Deposit Insurance Corporation (FDIC). See Lindquist & Vennum v. Federal Deposit Ins. Corp., 103 F.3d 1409, 1413-14 (8th Cir. 1997).

The exact details of Donohoo's transgressions are unimportant for purposes of this appeal; however, the following chronology is relevant. In September 1992, the

[1] The Honorable Richard H. Kyle, United State District Judge for the District of Minnesota.

FDIC assessed civil penalties against Donohoo in the amount of $1,000,554.00 for his July, 1990, violation. Donohoo appealed the assessment, and an administrative hearing was held before an administrative law judge (ALJ) in April-May, 1993. In September, 1994, the ALJ issued his Recommended Decision. The FDIC Board of Governors modified the ALJ's decision, and in September, 1995, issued its own decision ordering Donohoo to pay $1,000,554.00. Donohoo appealed the administrative decision to this court; we affirmed the penalty assessment on January 8, 1997. See id. Donohoo then sought a writ of *certiorari* from the Supreme Court, which was denied on October 6, 1997. See Donohoo v. Federal Deposit Ins. Corp., 522 U.S. 821 (1997).

In November, 1998, more than eight years after the commission of the act for which the penalty was assessed, the FDIC commenced this action to enforce the penalty pursuant to 12 U.S.C. § 1818(i). The district court granted the government's motion for summary judgment on December 20, 1999, rejecting without discussion Donohoo's argument that the government could not collect on the debt because the statute of limitations set forth in 28 U.S.C. § 2462 had run.

II.

Donohoo seeks review of only one issue: whether the district court erred in implicitly finding that the government's claim against him is not barred by the statute of limitations. We review the district court's grant of summary judgment de novo. See Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 486 (8th Cir. 1998).

The government proceeds against Donohoo pursuant to § 1818(i)(1) which allows the "appropriate Federal banking agency" to seek "enforcement of any effective and outstanding notice or order issued under this section" in district court. This statutory provision is not equipped with its own statute of limitations; thus, the general statute of limitations for collection of civil penalties, 28 U.S.C. § 2462, applies. Section 2462 states as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

Donohoo argues that the government's claim for enforcement of the penalties assessed against him by the FDIC is barred by this statute. He asks us to interpret the phrase "claim first accrued" to mean the date of the original violation for which the penalty was assessed, i.e., July, 1990. The government, in contrast, argues that the claim does not accrue until the administrative proceedings assessing the penalties are completed.

This question appears to be a matter of first impression in our circuit. The circuits are split on when a claim accrues under this statute of limitations. The Fifth Circuit favors Donohoo's approach. See United States v. Core Labs, Inc., 759F.2d 480 (5th Cir. 1985). The Core court analyzed caselaw arising under the various predecessors to § 2462 and found that "[a] review of these cases clearly demonstrates that the date of the underlying violation has been accepted without question as the date when the claim first accrued, and, therefore, as the date on which the statute began to run." Id. at 482. The court also found support for its position in the legislative history of the Export Administration Act, 50 U.S.C. App. § 2401, the Act pursuant to which the underlying lawsuit was brought. See id. Finally, the court noted that "[p]ractical considerations

support this construction. The progress of administrative proceedings is largely within the control of the Government. A limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none." Id. at 482-83.

The First Circuit takes the opposite position. See United States v. Meyers, 808 F.2d 912 (1st Cir. 1987). In Meyers, another proceeding under the Export Administration Act, the First Circuit rejected Core's reasoning ("the core of Core" id. at 913). Instead, the court held that where the Act which authorizes the assessment of a penalty provides for an administrative procedure for assessing that penalty, the statute of limitations at § 2462 does not begin to run until "the penalty has first been assessed administratively." Id. at 914. The Meyers court noted the "obvious proposition that a claim for 'enforcement' of an administrative penalty cannot possibly 'accrue' until there is a penalty to be enforced." Id. Because the court found the language of the relevant statutes to be unambiguous, it rejected any resort to statutory construction to aid in interpretation. Id. at 915. Further, the court noted that rather than preventing government abuses, the Fifth Circuit's interpretation could encourage violator abuses of the administrative system. If the government has

only five years from the date of the violation to assess a penalty and begin collection proceedings, the violator would have great incentive to delay the process as much as possible, hoping that the government's clock would run out before the enforcement proceedings began. See id. at 919. The court additionally noted that,

> [o]utside of the Fifth Circuit, no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the penalty was administratively imposed.

Id. at 916.

The parties direct us to only one case that has examined the question of when a claim accrues under § 1818. In that case, the court followed the First Circuit's lead and held that "[t]he government could not bring an action in this court to enforce the penalty until the final decision was issued, ...and the assessment was not further appealed." United States v. McIntyre, 779 F. Supp. 119, 122 (S.D. Iowa 1991).[2]

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[2] One other court has considered this question, ironically, in reference to Donohoo himself. During the course of the enforcement proceedings, Donohoo filed for bankruptcy in Florida, pursuant to Chapter 13 of the

The issue has significant consequences. In this case, under the Fifth Circuit's reasonings, the government would have had to commence its collection proceedings by July, 1995; thus, it would now be time-barred from attempting to enforce the penalty against Donohoo. Under the First Circuit's reasoning, however, the action instituted by the government in 1998 would be timely.

We find the First Circuit's reasoning to be more persuasive. We therefore hold that where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination.[3]

Bankruptcy Code. The government protested that the assessment of its fine against Donohoo raised Donohoo's debt beyond the cap for eligibility under Chapter 13. Donohoo countered by alleging that the government could not collect the penalty, because of the running of the statute of limitations period. The United States Bankruptcy Court for the Middle District of Florida, following the First Circuit's interpretation, held that "the assessment did not become final until the Supreme Court denied the Debtor's petition for certiorari on October 6, 1997." In Re Donohoo, 243, B.R. 139, 142 (Bankr. M.D. Fla. 1999).

[3] We need not decide whether an appeal of an administrative decision tot the federal courts would be considered part of the administrative penalty-assessment process, for purposes of determining when the limitations period begins to run. Both the date that the final administrative order

Our conviction that this is the correct rule is reinforced by our observation that § 1818(i) does not allow the government to begin a collection proceeding until the defendant "fails to pay an assessment after any penalty imposed under this paragraph had become final." 12 U.S.C. § 1818(i)(2)(I)(i). In other words, the government is precluded from bringing an enforcement action until the penalty has been finalized through administrative proceedings. Under the Fifth Circuit's rule, the government could find itself unable to collect on a penalty simply because those proceedings have taken too long. A violator should not be able to escape paying a penalty by dragging his feet through the administrative penalty-assessment process. Thus, we hold that the government's enforcement action is timely.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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was entered, and the date the Supreme Court denied review are within five years of the date the government initiated this suit.

UNITED STATE COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-1601

United States of America,	*	
Appellee,	*	Order Denying Petition
v.	*	for Rehearing and for
Richard D. Donohoo,	*	Rehearing En Banc
Appellant.	*	

The petition for rehearing en band is denied. The petition for rehearing by the panel is also denied.

Judge Loken did not participate in this decision.

(5128-010199)

January 29, 2001

Order Entered at the Direction of the Court:

/s/

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED

001 839 APR 30 2001

No. _____

In The
Supreme Court of the United States

October Term, 2001

RICHARD D. DONOHOO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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United States v. Richard D. Donohoo, et al., Civil No. 98-2387 RHK/JMM (D. Minn., Feb. 7, 2000)(Order amending Judgment to provide for interest) SA-13

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

Richard D. Donohoo,
Cheryl C. Godbout-Bandal, and
Bruce A. Rasmussen,

Defendants.

Civ. No. 98-2387/RHK/JMM[1]

MEMORANDUM OPINION AND ORDER

Mary Trippler, Assistant United States Attorney, Minneapolis, Minnesota, for Plaintiff.

Richard D. Donohoo, pro se, Minneapolis, Minnesota, for Defendant Donohoo.

Cheryl C. Godbout-Bandal, pro se, North Oaks, Minnesota, for Defendant Gobout-Bandal.

Philip W. Getts, Law Offices of Philip W. Getts, Minneapolis, Minnesota, for Defendant Rasmussen.

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[1] A second case had initially been filed, 98-2388/RHK/RLE, naming only Donohoo as a Defendant. On February 9, 1999, Magistrate Judge Mason consolidated the two cases, thereby closing 98-2388/RHK/RLE and merging the contents of that case with the instant case.

Introduction

Plaintiff United States of America ("the Government") has brought the instant action to enforce civil monetary penalties assessed by the FDIC against the Defendants. The FDIC determined that the Defendants, along with others, had violated the Change in Bank Control Act of 1978 (CBCA), 12 U.S.C. § 1817(j), and other statutes and regulations by acting in concert to obtain control of the Capital Bank in 1988 and 1989. See Lindquist & Vennum v. FDIC, 103 F.3d 1409, 1412-15 (8th Cir.), cert. denied, 118 S. Ct. 77 (1997). Consequently, the FDIC imposed civil monetary sanctions on each of the Defendants, who then appealed the FDIC's order to the Eighth Circuit Court of Appeals. See id. The Eighth Circuit heard the Defendants' appeal of the FDIC's order on October 21, 1996, and affirmed that part of the FDIC's order relating to the Defendants on January 8, 1997. A detailed description of the underlying facts is set forth in the Eighth Circuit's opinion. See id. In its opinion, the Eighth Circuit specifically considered the appropriateness of the monetary sanctions, noting that the FDIC had adopted penalties that required the Defendants to pay not only the amounts that they had received from the illegal takeover of Capital Bank but also an additional penalty. See id. at 1418. The court held that

such penalties were "substantially supported by evidence on the record as a whole and based on proper interpretations of the relevant statutory provisions." Id. at 1418-19.

The FDIC sent demand letters to the Defendants on March 12, 1997, and again on May 29, 1997, noting that the Eighth Circuit had affirmed the FDIC's order and demanding that each of the Defendants pay the penalties in their entirety. (See Genova Aff. ¶ 11 & Ex. E (demand letters).) The Defendants allege that they have "in effect" satisfied some portion of their debt, although this contention is limited to their argument that their payment of a judgment against them in a related litigation, Wenzel v. Mathies, 542 N.W.2d 634 (Minn. Ct. App. 1996), should be construed to satisfy the penalties imposed upon them by the FDIC. (See Rasmussen's Opp'n Mem. at 1-2, 4-5 ("Because Mr. Rasmussen made only one such profit, he should not be twice required to re-pay this sum and thus suffer a double penalty.").) The Defendants appealed the ruling against them in Wenzel, and the Minnesota Court of Appeals affirmed the lower court on January 16, 1996. Wenzel, 542 N.W.2d at 634. Currently before the Court is the

Government's Motion for Summary Judgment. For the reasons set forth below, the Court will grant the Motion.[2]

Analysis

A. Standard of Review

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment has the burden of identifying the evidence that it believes demonstrates the absence of a genuine issue of material fact. See Enterprise Bank v. Magna Bank, 92 F.3d 743, 747 (8th Cir. 1996); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). On a motion for summary judgment, the court does not weigh facts or evaluate the credibility of the evidence, but instead

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[2] The Government has moved for summary judgment against Defendants Donohoo, Godbout-Bandal, and Rasmussen. On May 17, 1999, Donohoo filed a Suggestion of Bankruptcy, which the Government concedes has the effect of staying the instant proceeding against him. Because the instant action against Donohoo is stayed, the Court's Memorandum Opinion and Order does not apply to him. The Court has included references to Donohoo's responsive memorandum, however, because prior to his filing of the Suggestion of Bankruptcy, Godbout-Bandal submitted a document to the Court in which she adopted the arguments set forth in the memoranda of both Rasmussen and Donohoo.

views all evidence and the inferences that may be reasonably drawn therefrom in the light most favorable to the nonmoving party. See Enterprise Bank, 92 F.3d at 747. The nonmoving party may not rest on mere allegations or denials, however, but must demonstrate on the record the existence of specific facts that create a genuine issue for trial. See Krenik v. County of Le Sueur, 47 F.3d 953, 957 (8th Cir. 1995). Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict in favor of the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 256, 106 S. Ct. 2505, 2514 (1986).

B. This Court's Power to Review the FDIC Order

This Court has power to enforce the FDIC's order pursuant to 12 U.S.C. § 1818(i)(1), which provides as follows:

> The appropriate Federal banking agency may in its discretion apply to the United States district court...within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831o or 1831p-1 of this title, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise

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(See March 26, 1999 letter from Godbout-Bandal to Trippler (attached to Rasmussen Aff.).)

> provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i)(1). Section 1818 goes on to provide that, if any person fails to pay a penalty assessed under the jurisdiction and enforcement paragraph of the statute, "the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court." Id. § 1818(i)(2)(I)(i). Finally, the statute states: "In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review." Id. § 1818(i)(2)(I)(ii). "Thus, the very same statute that vests this Court with jurisdiction to adjudicate this enforcement action precludes it from examining the merits of [the Defendants'] challenges to the [FDIC]'s ability to issue the ...Order." Office of Thrift Supervision v. Paul, 985 F. Supp. 1465, 1470 (S.D. Fla. 1997).

Courts have interpreted and applied this "preclusion clause" of § 1818(i) according to its literal terms, as not allowing a district court to review the decisions of an agency proceeding under the statute. See Paul, 985 F. Supp. at 1471 (collecting cases); see also United States v. McKinney, 983

F.2d 1079 (unpublished table decision), 1992 WL 375194 (9th Cir. 1992); Leuthe v. Office of Fin. Inst. Adjudication, 977 F. Supp. 357, 361 (E.D. Pa. 1997), aff'd, 162 F.3d 1151 (3d Cir. 1998). In Groos National Bank v. Comptroller of Currency, 573 F.2d 889 (5th Cir. 1978), the Fifth Circuit discussed the rationale behind § 1818(i)'s preclusion clause:

> Section 1818 as a whole provides a detailed framework for regulatory enforcement and for orderly review of the various stages of enforcement; and section 1818(i) in particular evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention, at least where there is no "clear departure from statutory authority."

Groos, 573 F.2d at 895 (citing Manges v. Camp, 474 F.2d 97 (5th Cir. 1973)).

In the instant case, the Defendants do not argue that there has been a "clear departure from statutory authority," and the Court finds that such an argument would be untenable in light of the fact that the Eighth Circuit has already reviewed and affirmed the FDIC's order. Instead, they argue that, because each of them has satisfied the judgment in Wenzel, the related state court case, it would be unfair to force them to again suffer a penalty for their misconduct. (See Donohoo Opp'n Mem. at 4-5; Rasmussen Opp'n Mem. at 4-5.) In addition, Donohoo argues that the

FDIC order is barred by the applicable statute of limitations, and that the imposition of the penalty by the FDIC violates his rights to a jury trial under the Seventh Amendment, to a speedy and public trial under the Sixth Amendment, and to be free from excessive fines and cruel and unusual punishment under the Eighth Amendment. (See Donohoo Opp'n Mem. at 5-8.)

To resolve any of the Defendants' arguments would require this Court not only to second-guess the Eighth Circuit, which has already affirmed the FDIC's order against each of the Defendants, but also to violate the express wording of the preclusion clause of § 1818(i).[3] The framework provided by § 1818 for reviewing such orders as that imposed by the FDIC in the instant case simply does not allow a district court to change or set aside the order, except where the agency's action is "blatantly lawless." Abercrombie v. Office of Comptroller of Currency, 833 F.2d 672, 675 (7th Cir. 1987). As noted above, the Defendants have not claimed in the instant case that the FDIC's action was "blatantly lawless" and the Court concludes that such an argument is foreclosed by the Eighth Circuit's affirmance of

[3] The Defendants undeniably had the opportunity to raise all of these issues before the Eighth Circuit, because Wenzel was decided several months before their appeal of the FDIC order was submitted to the Eighth Circuit.

the order in FDIC v. Lindquist & Vennum, 103 F.3d 1409 (8th Cir. 1997). Accordingly, the Court concludes that it lacks jurisdiction to review the FDIC's order.

Conclusion

For the foregoing reasons, and based upon all of the files, records, and proceedings herein, **IT IS ORDERED** that:

(1) In case No. 98-2387/RHK/JMM, the Plaintiff's Motion for Summary Judgment (Doc. Nos. 27, 30) is **GRANTED** with regard to Defendants Rasmussen and Godbout-Bandal;

(2) Defendant Rasmussen shall pay Plaintiff the sum of $38,600.00 principal plus costs, post-judgment interest at the legal rate from the date of entry of this Memorandum Opinion and Order until paid in full;

(3) Defendant Godbout-Bandal shall pay Plaintiff the sum of $150,000.00 principal plus costs, post-judgment interest at the legal rate from the date of entry of this Memorandum Opinion and Order until paid in full; and

(4) The Court expressly determines that there is no just reason for delaying the entry of judgment against Defendants Rasmussen and Godbout-Bandal, and the Clerk of Court is expressly directed to enter judgment.

LET JUDGMENT BE ENTERED ACCORDINGLY.

May 28, 1999

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs. Civil No. 98-2387(RHK/JMM)

Richard Donohoo,

Defendant. **ORDER**

Before the Court is the United States' Motion for Summary Judgment against Defendant Richard Donohoo.

On May 28, 1999, this Court filed a Memorandum Opinion and Order (Doc. No. 41) granting summary judgment in favor of the United States and against co-defendants Cheryl C. Godbout-Bandal and Bruce A. Rasmussen.

That earlier decision is now expressly reaffirmed in all respects, both factual and legal, and incorporated herein by reference. As appears from footnote 3, Defendant Richard Donohoo had filed a Suggestion of Bankruptcy which had the effect of staying the proceeding against him. He had, however, filed a Memorandum (Doc. No. 30) in response to the Government's Summary Judgment Motion. On August 19, 1999, the Bankruptcy Court in the Middle

District of Florida dismissed Donohoo's bankruptcy petition. See In re: Richard D. Donohoo, Debtor, Case No. 99-7644-9BC. The effect of the dismissal was to lift the automatic stay. The Government has now renewed its Motion for Summary Judgment with respect to Donohoo.

Defendant Donohoo has responded to the instant Motion suggesting that a delay would be appropriate in view of his pending appeal in the Florida Bankruptcy proceeding. He has also filed a Supplemental Memorandum.

Upon all the files, records, and proceedings herein, including this Court's May 28, 1999 Memorandum Opinion and Order (Doc. No. 41), which is incorporated herein by reference, **IT IS ORDERED** that Plaintiff's Motion for Summary Judgment (Doc. No. 48) is **GRANTED**, and the Clerk of Court is directed to enter judgment against Defendant Richard Donohoo in the amount of $1,000,544.00 (One Million Five Hundred Forty-Four and No/100 Dollars). **LET JUDGMENT BE ENTERED ACCORDINGLY.**

December 20, 1999

RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Civil No. 98-2388 (RHK/RLE)

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	ORDER
	)	
RICHARD DONOHOO,	)	
Defendant.	)	

This matter comes before the Court, without hearing, pursuant to Rule 60(a), Fed.R.Civ.P.

Based upon the motion of the plaintiff United States and upon all the files, records and proceeding herein,

IT IS HEREBY ORDERED that the Judgment and Order, dated December 20, 1999, is amended to provide that:

(1) Plaintiff's motion for summary judgment (Doc. No. 48) is granted, and

(2) The Clerk of Court is directed to enter judgment against defendant Richard Donohoo in the amount of $1,000,544.00, plus post-judgment interest at the legal rate.

Dated: February 7, 2000

RICHARD H. KYLE
United States District Judge

Supreme Court, U.S.
FILED
AUG 9 2001

No. 00-1889

In the Supreme Court of the United States

RICHARD D. DONOHOO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the five-year statute of limitations on this action to collect an unpaid civil monetary penalty imposed under the Federal Deposit Insurance Act, 12 U.S.C. 1818(i)(2), began to run at the time of the conduct that led to the imposition of the penalty, or not until (at the earliest) the time of the final administrative decision imposing the penalty.

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In the Supreme Court of the United States

No. 00-1889

RICHARD D. DONOHOO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 232 F.3d 637. The order of the district court (Pet. Supp. App. A11-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2000. A petition for rehearing was denied on January 29, 2001 (Pet. App. A10). The petition for a writ of certiorari was filed on April 30, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Federal Deposit Insurance Act (the Act), 12 U.S.C. 1811 *et seq.*, authorizes the Federal Deposit

Insurance Corporation (FDIC) and other federal bank regulatory agencies to impose civil monetary penalties on any insured depository institution or "institution-affiliated party" that "violates any law or regulation." 12 U.S.C. 1818(i)(2); see 12 U.S.C. 1813(q) (defining "appropriate Federal banking agency"). A penalty so imposed is to be "assessed and collected" by written notice. 12 U.S.C. 1818(i)(2)(E)(i). If the party assessed does not request an agency hearing within 20 days after the notice of assessment is issued, the assessment becomes a "final and unappealable order." 12 U.S.C. 1818(i)(2)(E)(ii) and (H).

If the assessed party requests a hearing, the banking agency must hold the hearing and then, "within ninety days after [it] has notified the parties that the case has been submitted to it for final decision, * * * render its decision * * * and * * * issue and serve upon each party to the proceeding an order or orders consistent with the provisions of [the Act]." 12 U.S.C. 1818(h)(1); see 12 U.S.C. 1818(i)(2)(H). Any party to the administrative proceeding may seek judicial review of the agency's order in the court of appeals for the circuit in which the home office of the depository institution is located, or in the District of Columbia Circuit. 12 U.S.C. 1818(h)(2). The judgment of the court of appeals "shall be final" unless this Court grants a petition for certiorari. 12 U.S.C. 1818(h)(2).

If a party "fails to pay an assessment after any penalty assessed under [the Act] has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court." 12 U.S.C. 1818(i)(2)(I)(i). In such a collection action, "the validity and appropriateness of the penalty shall not be subject to review." 12 U.S.C. 1818(i)(2)(I)(ii). Under 28 U.S.C. 2462, "[e]xcept as

otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

2. Petitioner was an officer, director and shareholder of Capital Bank, a federally insured depository institution. In July 1990, petitioner and others arranged for the issuance, sale and purchase of new shares of the bank without prior regulatory approval, in violation of the Change in Bank Control Act of 1978, 12 U.S.C. 1817(j) (1994 & Supp. V 1999). See Pet. App. A2; *Lindquist & Vennum* v. *FDIC*, 103 F.3d 1409, 1412-1413 (8th Cir. 1997). Petitioner also engaged in a variety of other improper transactions involving the bank. See *Lindquist & Vennum*, 103 F.3d at 1413-1417. On the basis of petitioner's actions, in September 1992 the FDIC assessed civil penalties against him in the amount of $1,000,554. Pet. App. A2-A3.

Petitioner appealed the assessment, and an administrative hearing was held in April and May of 1993. Pet. App. A3. The administrative law judge issued his Recommended Decision in September 1994. *Ibid.* The FDIC's Board of Governors reviewed and modified that decision, and in September 1995 issued its own decision, also ordering petitioner to pay $1,000,554. *Ibid.* Petitioner sought review of that order in the court of appeals, which affirmed assessment of the penalty on January 8, 1997. *Lindquist & Vennum*, 103 F.3d at 1418-1419. Petitioner then sought review by this Court, but the Court denied his petition for a writ of

certiorari on October 6, 1997. *Donohoo* v. *FDIC*, 522 U.S. 821.

2. Petitioner did not pay the amount assessed. In November 1998, the FDIC brought the present action to enforce the penalty. Pet. App. A3. The district court granted summary judgment for the government. Pet. Supp. App. A1-A13. The court rejected, without discussion, petitioner's argument that the action was barred by the statute of limitations. *Id.* at A7-A8.

The court of appeals affirmed. Pet. App. A1-A9. The court rejected petitioner's argument that the FDIC's claim for payment of the civil penalties "first accrued," for purposes of the statute of limitations in 28 U.S.C. 2462, on the date of the violation for which the penalty was ultimately assessed. See Pet. App. A5, A8. The court noted that the Fifth Circuit had accepted a similar argument in applying Section 2462 to a suit to collect a civil penalty imposed under the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, but that the First Circuit had held that because the Export Administration Act provided an administrative procedure for the assessment of penalties, the statute of limitations on a collection action would not begin to run until the penalty had been assessed. Pet. App. A5-A7 (discussing *United States* v. *Meyer*, 808 F.2d 912 (1st Cir. 1987), and *United States* v. *Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985)).

The court observed that under 12 U.S.C. 1818(i), an agency may not bring a collection action "until the defendant 'fails to pay an assessment after any penalty imposed under [Section 1818(i)(2)] has become final.'" Pet. App. A9 (quoting 12 U.S.C. 1818(i)(2)(I)(i)). Thus, "the government is precluded from bringing an enforcement action until the penalty has been finalized through administrative proceedings." *Ibid.* With that

constraint, the court pointed out, "[u]nder the Fifth Circuit's rule [running the statute of limitations from the time of the original violation], the government could find itself unable to collect on a penalty simply because those proceedings have taken too long." *Ibid.* The court rejected that result, reasoning that "[a] violator should not be able to escape paying a penalty by dragging his feet through the administrative penalty-assessment process." *Ibid.* The court instead found the First Circuit's reasoning more persuasive, and held that "where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination." *Id.* at A8.[1]

ARGUMENT

1. Under 28 U.S.C. 2642, an action for the enforcement of a federal civil penalty must be commenced "within five years from the date when the claim first accrued." But a claim for the enforcement of such a penalty does not "accrue" until, at a minimum, the person on whom it is imposed has come under a legal obligation to pay it. When a banking agency assesses a penalty under 12 U.S.C. 1818(i)(2), the party assessed has the right to an administrative hearing. If such a hearing is requested, the administrative order imposing the penalty becomes final and enforceable, at the earli-

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[1] The court found it unnecessary to decide whether the administrative decision became "final" before judicial review was complete. In this case, the court noted, "[b]oth the date that the final administrative order was entered, and the date the Supreme Court denied review are within five years of the date the government initiated" the collection action. Pet. App. A8-A9 n.3.

est, only once the agency has held the hearing and rendered its "final decision." See 12 U.S.C. 1818(h)(1), (i)(2)(E)(ii) and (H). The agency may seek judicial enforcement of the penalty only "[i]f any * * * person fails to pay an assessment after any penalty assessed * * * has become final." 12 U.S.C. 1818(i)(2)(I)(i). Accordingly, the claim for such enforcement does not accrue before the penalty has become final and the agency may legally demand payment. See *United States* v. *McIntyre*, 779 F. Supp. 119, 122 (S.D. Iowa 1991); *In re Donahoo*, 243 B.R. 139, 142 (M.D. Fla. 1999); cf., *e.g.*, *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201-202 (1997) (pension plan's claim against withdrawing employer did not accrue until plan set schedule of withdrawal payments and employer failed to pay; "standard rule" is that "the limitations period commences when the plaintiff has 'a complete and present cause of action,'" and generally "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief") (citation omitted).[2]

Petitioner argues (Pet. 10-11) that a claim to enforce a civil penalty imposed under Section 1818(i)(2) should accrue at the time of the underlying banking-law violation, or at the time the agency makes its initial ad-

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[2] As the court of appeals explained (Pet. App. A8-A9 n.3), there is no need to decide in this case precisely when a penalty under Section 1818(i)(2) becomes "final" for purposes of collection, or when a claim for judicial enforcement accrues. The penalty might become final at the time of the final administrative decision, or only after the decision has been sustained on judicial review or the time for seeking further review has expired. The claim for enforcement might accrue when the penalty becomes final, or only after the assessed party has refused to honor a proper demand for payment.

ministrative assessment of the penalty. Such a rule would make no sense. First, the "claim" for enforcement is entirely inchoate until the agency makes its initial decision to assess a penalty of a particular amount. Second, even at that time, the propriety and amount of the assessment remain subject to further agency proceedings at the behest of the assessed party, and an enforcement action may not be brought until the administrative assessment "has become final." 12 U.S.C. 1818(i)(2)(I)(i). As the court of appeals observed, a rule under which the time for judicial enforcement began to run before the commencement of administrative proceedings (or at the time such proceedings were first commenced) would produce an incentive for the assessed party "to delay the [administrative] process as much as possible" (Pet. App. A7), and would lead to a situation in which "the government could find itself unable to collect on a penalty simply because [the administrative] proceedings have taken too long" (*id.* at A9). That would not be a sensible result. Cf. *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.").

Petitioner protests that postponing accrual until the cause of action for enforcement is ripe will result in individuals "remain[ing] for ever liable to a pecuniary forfeiture." Pet. 6 (quoting *3M Co.* v. *Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994), in turn quoting *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 341 (1805)). But the question is not whether judicial enforcement of a penalty imposed under Section 1818(i)(2) is subject to

any period of limitation. Whether the claim for judicial enforcement accrues when the administrative assessment becomes final, when judicial review has concluded, or when the assessed party has failed to make a properly demanded payment, the time for such enforcement is specifically limited by Section 2462.

In this case, as petitioner explains (Pet. 3-4, 6), petitioner violated the Act in 1990. The FDIC made its initial penalty assessment in 1992, held a hearing in 1993, and issued its interim decision in 1994 and its final decision in 1995. The judicial review pursued by petitioner was completed in October 1997, when this Court denied review of the Eighth Circuit's decision sustaining the administrative order. Petitioner did not pay the penalty, and the FDIC brought this enforcement action in 1998. The collection suit was therefore timely under any proper construction of when the claim for enforcement accrued, and there is no substance to petitioner's fears (Pet. 6-7) of administrative delay or "perpetu[al]" liability.

2. Petitioner contends (Pet. 5-9) that the decision of the court of appeals conflicts with *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 73 (1953), and *United States* v. *Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985). *Unexcelled Chemical* involved a suit to collect "liquidated damages" under the Walsh-Healy Act, 41 U.S.C. 35 *et seq.*, and held that the two-year statute of limitations in the Portal-to-Portal Act of 1947, 29 U.S.C. 255, had begun to run at the time of the underlying violation. See 345 U.S. at 65. *Core Laboratories* held that for purposes of Section 2462, a claim for collection of sanctions imposed under the antiboycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, accrued at the time of the sanctionable conduct.

In *Unexcelled Chemical*, the Court emphasized that the Attorney General was authorized to bring suit to collect the liquidated damages without regard to the pendency of administrative proceedings before the Secretary of Labor. 345 U.S. at 65-66. In this case, by contrast, 12 U.S.C. 1818(i)(2)(I)(i) expressly precluded the FDIC from bringing suit to collect a penalty assessed under Section 1818(i)(2) until the penalty "ha[d] become final." Here, therefore, awaiting the outcome of the administrative proceedings was a necessary prerequisite to suit, not simply a matter of "judicial administration." 345 U.S. at 66; see also *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 519 (1967) (distinguishing *Unexcelled Chemical*); *United States* v. *Meyer*, 808 F.2d 912, 917 (1st Cir. 1987) (same).

In *Core Laboratories*, the Fifth Circuit emphasized that each statute must be examined on its own terms for purposes of construing the applicable statute of limitations. 759 F.2d at 481-482 (citing *Crown Coat Front*, 386 U.S. at 517). In applying Section 2462 in the context of the Export Administration Act, the court relied, in significant part, on legislative history indicating that Congress specifically intended the five-year limitation period to apply to administrative as well as to judicial proceedings, and to run from the time of the act giving rise to the liability. *Id.* at 482. Petitioner points to no evidence of congressional intent that the period of limitations for a collection action under Section 1818(i)(2)(I) should run from the time of the violation. Moreover, the Export Administration Act provides that in an action brought to recover a civil penalty "the court shall determine de novo all issues necessary to the establishment of liability," 50 U.S.C. App. 2410(f), whereas in a collection action under Section 1818(i)(2)(I)(ii), "the validity and appropriateness of the penalty

shall not be subject to [judicial] review." There are, accordingly, material differences between the provisions at issue in *Core Laboratories* and in this case, and there is no reason to assume that the Fifth Circuit would disagree with the decision below.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2001

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[3] For the same reason, there is no need to consider in this case the conflict between *Core Laboratories* and the First Circuit's more recent (and better reasoned) decision in *Meyer*, which reached a different conclusion concerning the application of Section 2462 to suits for collection of sanctions imposed under the Export Administration Act. See Pet. App. A6-A7. Nor is there any reason to hold this case pending the Court's consideration of *TRW Inc.* v. *Andrews*, No. 00-1045, which involves whether a "discovery rule" applies in determining when the limitation period begins to run for consumer actions under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, or *National Railroad Passenger Corp.* v. *Morgan*, No. 00-1614, which presents a question concerning the "continuing violation" doctrine in the context of federal anti-discrimination statutes. The questions at issue in those cases are quite distinct from the question petitioner seeks to present.